92-890

Supreme Court, U.S.
FILED
SEP 15 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER Term 1992

LESLIE GUINN

Petitioner

vs.

TEXAS CHRISTIAN UNIVERSITY,
THE HARRIS COLLEGE OF NURSING,
WILLIAM E. TUCKER,
WILLIAM H. KOEHLER,
PATRICIA SCEARSE,
CAROLYN SPENCE CAGLE,
AND CAROL A. STEPHENSON

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS THE SECOND COURT OF APPEALS DISTRICT STATE OF TEXAS

Leslie Guinn Pro Sea
4445 Rolling Hills Dr.
Fort Worth Texas, 76119
(817) 457-0399

-36pt

QUESTION PRESENTED FOR REVIEW

Weather a Individual posses a justiciable cause of action to sue or Counter-sue a University, it's faculty and staff for negligence resulting in the systematic discrimination, harassment, abuse, and mistreatment of some students due to Respondents gross departure from established professional practices, sexual bias, and the failure to use even ordinary care and caution with students under their care resulting in injury, and damage to those students.

TABLE OF CONTENTS

Page

Jurisdiction 1-2

Statutes Involved 3-4

Statement Of Case 5-21

Argument for Allowance of Writ 21-24

Conclusion 24

Ruling Of The Supreme Court Of Texas of May 20 1992 ..... App A

Ruling Of The Supreme Court Of Texas of June 17, 1992 ..... App B

Ruling Of The Secound Court Of Appeals of November 13, 1991 ..... App C

Opinion Of The Secound Court Of Appeals of November 13, 1991 ..... App D

Ruling Of The Secound Court Of Appeals of December 31, 1991 ..... App E

Summary Judgment of the 352nd District Court of May 23, 1990 ..... App F

Notice of Dismissal of the 352nd District Court of May 23, 1990 ..... App G

TABLE OF AUTHORITIES

Franklin v. Gwinnett Public Schools and Prescott 32033 WL. U.S. S.Ct (1992)..... 18,19,20

Cannon v. University Of Chicago, 411 U.S. 677 (1979)..... 19

OPINIONS BELOW

On May 20, 1991, The Supreme Court of the State of Texas, issued an order denying Petitioner's petition for review of the decision of the Secound Court of Appeals of Texas. A copy of this order is attached as Appendix A, and B.

The Secound Court of Appeals of Texas, issued a decision and opinion on September 13, 1991 affirming a summary judgment of the 352nd District for Tarrant County, Texas, dissmissing Petitioner's suit/counter-suit. The September 13, 1991 ruling of the Second Court Of Appeals, whose judgment is herein sought to be reviewed, is reprinted in the separate Appendix to this Petition, Appendix C, D, and E.

JURISDICTION

The Opinion of the Second Court of Appeals was entered on September 13, 1991. A timely petition for rehearing was overruled on December 31, 1991. A timely

petition for a Writ Of Error was denied by the Supreme Court Of Texas on May 20, 1992. Lastly a timely petition for a rehearing was overruled by the Supreme Court Of Texas on June 17, 1992. The jurisdiction of the Supreme Court Is invoked under 28 USC 1254(1), 1257(3), Title IX, 20 USC 1681.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution Of the United States which provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Title IX. (1972), 20 USC (1681). which provides as follows:

No persons in the United States Shall, on the basis of sex, be excluded from participation in, be denied the

benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

STATEMENT OF CASE

This action is primarily founded in discrimination that was expressed through the harassment of Petitioner, by way of -the abuse, and mistreatment of Petitioner while a student at Texas Christian University, Fort Worth, Texas. This action arose as a counter-suit by Petitioner in response to a suit by Respondents brought to intimidate, and harass petitioner.

THE EVIDENCE

Petitioner was a Male student in the Texas Christian university's Harris College Of Nursing. In March, 1985 Petitioner called the Texas Christian University Harris College Of Nursing school about transferring from the University Of Texas Arlington school of nursing into the Texas Christian University Harris College Of Nursing school to complete a nursing degree that Petitioner had been working on prior to his planned completion of a

Baccalaureate degree in the University Of Texas Arlington school of Liberal Arts.

Petitioner explained that Petitioner had a very bad experiences while a student in the University Of Texas Arlington school of nursing, and that Petitioner had lost all desire to complete a nursing degree at the University Of Texas Arlington school of nursing after the terrible way Petitioner was treated by some of the University Of Texas Arlington faculty while a student in the nursing program at the University Of Texas Arlington. Petitioner explained that Petitioner believed that the reprehensible conduct that Petitioner was subjected to was just a aberration and not representative of most nursing schools, or of nursing schools as a whole. But Petitioner further explained that because of the bad experience Petitioner had in the University Of Texas Arlington school of Nursing Petitioner wanted to be sure that

the Texas Christian University Harris College Of Nursing school did not have the same type of problems, or faculty. Because then as now Petitioner could go to most any nursing school Petitioner wanted to, and Petitioner did not want to invest his time, money, and hard work in Texas Christian University if they where not committed to helping him succeed in the timely completion on his bachelor of sciences in nursing.

After some assurances from the Texas Christian University nursing school faculty adviser, and the Dean of the Texas Christian University school of nursing that they where committed to the success of all the students in there Nursing school, and would be likewise committed to Petitioner, Petitioner began discussions in earnest about specific requirements to complete his Bachelor of sciences in nursing in a timely manner at Texas Christian University Harris College Of Nursing. During discussions

concerning the stated requirements in the Texas Christian University school catalogs, and the requirements stated to him by Texas Christian University nursing school faculty adviser, and the Dean of the Texas Christian University school of nursing for his completion of a Bachelor of sciences in nursing at Texas Christian University Harris College Of Nursing Petitioner began to have misgivings about entering the Texas Christian University Harris College Of Nursing program. As a result of his misgivings Petitioner decided to not enroll in the nursing program in the Fall of 1985 as advised by Texas Christian University Harris College Of Nursing. For the next several months Petitioner communicated with Texas Christian University Harris College Of Nursing about what they wanted from him, and what Petitioner would expect from respondents if Petitioner enrolled in their program.

Finally after Petitioner received

a letter from Texas Christian University Harris College Of Nursing, and after some coercing from a Texas Christian University nursing school faculty adviser that Texas Christian University Harris College Of Nursing did want petitioner, and would help petitioner with the timely completion of petitioners Bachelor of sciences in nursing at Texas Christian University Harris College Of Nursing Petitioner agreed to enroll in the Texas Christian University nursing program in the spring of 1986. Subsequent to petitioners enrollment at Texas Christian University it was agreed by Texas Christian University nursing school faculty adviser, the Dean of the Texas Christian University school of nursing, and Petitioner that Petitioner would graduate under the requirements of the Current Catalog rather than an earlier catalog over petitioners strong objections. Further it was agreed that Texas Christian University would abide by the stated requirements of

the current catalog.

During petitioners mandatory advisement before enrollment in the Spring of 1986 nursing program Petitioner specifically, and emphatically requested that he not be overloaded with courses. Petitioner explained that this would be his first semester in the nursing program at Texas Christian University, and that Petitioner would need time to get used to the new school. Plus Petitioner had recently just finished a tremendous amount of school work at the University Of Texas Arlington in completing a Baccalaureate degree at the University Of Texas Arlington. Since Petitioner could not enroll with out being advised, and since much of the Texas Christian University Harris College Of Nursing classes, and clinical schedules where only arranged just prior to the beginning of school Petitioner pointed out that Petitioner would have to trust Texas Christian University nursing

school faculty adviser to see to it that Petitioner was not overloaded, and that there where no conflicts in petitioners schedule.

To Petitioners surprise Petitioner found that Petitioner had been advised, and enrolled in two courses that met at the same time. Petitioner had specifically, and emphatically requested that he not be overloaded with courses his first semester in the Texas Christian University nursing program. Now Petitioner would have to try a do well in two classes that met at the same time. Petitioner would have to take test, and write papers when Petitioner could not be at the lectures to see, hear, take note's, or ask question like the rest of petitioners classmates. That was very unfair. Petitioner did well in all course work that semester. But no mater how well Petitioner did that semester Petitioner would have done better if Petitioner could have been present for all

Petitioners classes when they met. Having to try and succeed under those circumstances petitioners first semester in the Texas Christian University Harris College Of Nursing program was a tremendous physical, psychological, and intellectual strain on petitioner, and those around petitioner.

Petitioner thought strongly about withdrawing from the Texas Christian University nursing school, and going some place else to finish his Bachelor of sciences in nursing. But Petitioner had only a few more classes that Petitioner needed to finish, and Petitioner had done well that semester in spite of the circumstances. Petitioner reasoned that Petitioner had already invested a great amount of money, and a great amount of himself in the Texas Christian University program, and that as supposedly aware, and compassionate members of the health care profession Texas Christian University would

recognize, and understand how much they had hurt petitioner, and see that no more abuse accrued. Petitioner was wrong. Instead of an acknowledgement of the wrong Petitioner had just been put through Petitioner was counseled by Texas Christian University nursing school faculty adviser for having a 71% average in a class that Petitioner could not attend regularly because of a faculty error in advising petitioner. Some students did not pass the class who had no scheduling conflicts, and could be present for all class lectures. While Petitioner on the other hand often only had poor tape-recordings of what was covered in class, and sometimes Petitioner did not have that.

In April, 1986 Petitioner met with the Texas Christian university faculty adviser to get his mandatory advisement about what courses Petitioner would be allowed to take for the Fall semester of 1986. Petitioner was told that Petitioner

would have to take a nursing class from a particular faculty member. Unlike the rest of the students Petitioner was not allowed to draw for this particular faculty member. If Petitioner had been able to participate in the draw Petitioner would have tried not to choose the faculty member selected for him. Petitioner had been warned by present, and former students that the particular faculty member in question was a bad, and abusive instructor. Petitioner was warned that the faculty member in question failed a student every semester particularly male students. This fact was later confirmed by documents compiled by the UNITED STATES DEPARTMENT OF EDUCATION. Further the nursing class in question was the next to the last required nursing class for students completing their four year Bachelor of sciences in nursing.

Petitioner was subjected to frequent, and repeated abuse, and mistreatment by the faculty of Texas

christian University. Petitioner was subjected to verbal, psychological, emotional and academic abuse. Further Petitioner was witness to the same type of abuse of his fellow classmates by the faculty member in question. As a result of this abuse Petitioner suffered Physically, Psychologically, Emotionally, and Academically.

On completion of all petitioners class work for that semester Petitioner attempted to make a complaint about Petitioners overall mistreatment in the nursing program, and in particular Petitioners resent abuse, and mistreatment by a faculty member during his clinical studies. Petitioner was advised by the Dean of the Texas Christian University school of nursing that Petitioner should contact the Texas Christian University Dean of academic affairs concerning petitioners complaints.

Petitioner called the Dean Of academic affairs office about getting

information on the proper way to make a complaint. Petitioner was told by the dean of academic affairs secretary that Petitioner would have to make a appointment to see the dean of academic affairs before Petitioner could get any information. The earliest appointment that Petitioner could get to see the dean was several weeks off. But Petitioner made the appointment, and scheduled petitioners personal appointments so Petitioner could meet with the dean at his convenience. Less than an Hour before the dean and petitioner where to meet Petitioner received a call from the Dean's secretary stating that the Dean was canceling petitioners appointment to meet with him. Petitioner ask the Dean's secretary why he was canceling petitioners appointment. The Deans secretary stated that he was going home early. Petitioner told her that Petitioner had gone to great lengths to meet with the Dean at the scheduled time. She stated that the Dean

was feeling a little ill. Petitioner ask if the Dean had arranged for someone else to take care of his responsibilities if he could not. His secretary said no. Petitioner was told he would have to meet with the Dean of academic affairs, and only the Dean of academic affairs before Petitioner could get the requested information to make a complaint. Petitioner ask for another appointment but was not given one.

Following the cancellation of Petitioners appointment with the Texas Christian University Dean Of academic affairs Petitioner sent numerous letters trying to get information on how, and who to file petitioners complaints with so they could be resolved, and Petitioner could finish his Bachelor of sciences in nursing. Petitioner made numerous phone call to the Dean of the Texas Christian University school of nursing, and a faculty member to try to get a evaluation of petitioner by a

faculty member to accompany petitioners complaints. Petitioner's phone calls, and letters where ignored by all until Petitioner ask a attorney to intervene on petitioners behalf. Several letters went back and forth between the Dean of academic affairs, attorneys for Texas Christian University, and Petitioner. Finally the dean of academic affairs agreed to meet with petitioners attorney, but the dean of academic affairs refused to meet with petitioner or allow petitioner to be present at the meeting petitioner had requested.

After over eleven months and a full academic year from the date of petitioners first request for information to make a complaint with Texas Christian University about his mistreatment, and abuse in the Nursing program at Texas Christian University petitioner had still not been allowed to meet with the Dean of academic affairs or received all the

information Petitioner requested to file a formal complaint. In spite of the fact that the Dean of academic affairs stated in several letters that it was his responsibility to hear any complaints of abuse and mistreatment of students by faculty and staff of Texas Christian University. During this time the completion of Petitioners Bachelor of sciences in nursing had been put on hold.

At various times before, during, and after petitioners enrollment at Texas Christian University, and Texas Christian University Harris College Of Nursing. Petitioner was subjected to abuse, and mistreatment by harassment, intimidation, deception, and conspiracies to obstruct petitioners education by members of the faculty and staff of Texas Christian University, and The Texas Christian University Harris College Of Nursing.

In the process of trying to resolve the problems with Texas Christian

University Harris College Of Nursing Petitioner was forced to seek the help, and assistance of THE UNITED STATES DEPARTMENT OF EDUCATION. The documents compiled during the investigation of Texas Christian University, and Texas Christian University Harris College Of Nursing by THE UNITED STATES DEPARTMENT OF EDUCATION provided further evidence of the discrimination, harassment, abuse, and mistreatment of some students by faculty, and staff of Texas Christian University, and the Texas Christian University Harris College Of Nursing.

The Rulings Below

The District Court dismissed Petitioners suit holding that Petitioner had no right of action because the District Court held that Plaintiffs had no right of damages in a suit of this type. The Court of Appeals held that petitioner did not have a justiciable cause of action because petitioner did not have a right to sue for

civil rights violation by a school, it's, faculty and staff unless it could be shown that their action where completely arbitrary. The District Courts rulings characteristically represented the prevailing opinions of the lower courts just prior to the United Stats Supreme Courts ruling in Franklin v. Gwinnett County Public School and Prescott 32033 WL. U. S. S.Ct. (1992).

REASON FOR GRANTING THE WRIT

1.

Certiorari should Be Granted to Correct errors in principals In The Lower Courts, and further clarify the ruling of the United States Supreme Court in Franklin v. Gwinnett County Public School and Prescott 32033 WL. U. S. S.Ct. (1992).

Petitioners suit against respondents provided all the necessary elements for the justiciable causes of actions against respondents. In rulings as recent as February 26, 1992 the U. S.

Supreme Court held that in suits of this type cause of actions are implied and is enforceable by monetary damage awards under enforcement of Title IX Franklin v. Gwinnett County Public School and Prescott 32033 WL. U. S. S.Ct. (1992). Respondents are clearly under the provisions of Title IX as proved by the investigation of respondents by the U. S. Department Of Education Office Of Civil Rights. Prior to the U. S. Supreme Courts Ruling the Seventh Circuit Court in Cannon v. University Of Chicago Et. Al. held that a "Petitioner may maintain" his "lawsuit, despite the absence of any express authorization for it in Title IX, and "that Congress intended to create a private cause of action" Cannon v University Of Chicago, 441 U. S. 677 (1979). Petitioner provided voluminous, and extensive documentary, affidavit, and testimonial proof to support the necessary elements of petitioners justiciable causes of actions against respondents much of

which was compiled by the U. S. Department Of Education Office Of Civil Rights.

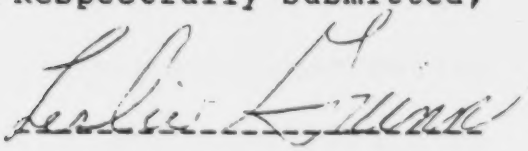
At the time of the initiation of this action the lower courts had not recognized a litigants rights to full relief under Title IX. This was subsequently corrected by the ruling of The United States Supreme Court in Franklin v. Gwinnett County Public School and Prescott 32033 WL. U. S. S.Ct. (1992).

In light of the lower courts failures to recognize litigants rights to full relief from discrimination under Title IX., Petitioner was forced to focus his suit on the negligent acts and omissions committed against petitioner by respondents in the discriminatory violation of Petitioners Civil Rights. In fact the evolution of Petitioners suit/counter-suit parallels the Franklin v. Gwinnett suit which the United States Supreme Court recently ruled in Franklin v. Gwinnett Public Schools and Prescott 32033 WL.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully Submitted,



Leslie Guinn

Petitioner

4445 Rolling Hills Dr.

Fort Worth, Texas

76119

(817) 457-0399

THE SUPRMM COURT OF TEXAS

P. O. Box 12248

Supreme Court Building

Austin, Texas 78711

John T. Adams, Clerk

May 20, 1992

Mr. Leslie Guinn

4445 Rolling Hills Dr.

Fort Worth, TX 76119

Mr. William L. Latham

McDonald Sanders

1300 Continental Plaza

777 Main Street

Fort Worth, TX 76102

Mr. George Haratsis

McDonald Sanders

777 main street

1300 Continental Plaza

Fort Worth, TX 76102

RE: Case No. D-2116

Style: LESLIE GUINN V. TEXAS CHRISTIAN UNIVERSITY and THE HARRIS COLLEGE of NURSING, WILLIAM E. TUCKER, WILLIAM H. KOEHLER, PATRICIA SCEARSE, CAROLYN SPENCE CAGLE and CAROL A. STEPHENSON

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerly,

JOHN T. ADAMS, Clerk

by:s/ Courtland Crocker

Courtland Crocker, Deputy

THE SUPRMM COURT OF TEXAS

P. O. Box 12248

Supreme Court Building

Austin, Texas 78711

John T. Adams, Clerk

June 17, 1992

Mr. Leslie Guinn

4445 Rolling Hills Dr.

Fort Worth, TX 76119

Mr. William L. Latham

McDonald Sanders

1300 Continental Plaza

777 Main Street

Fort Worth, TX 76102

Mr. George Haratsis

McDonald Sanders

777 main street

1300 Continental Plaza

Fort Worth, TX 76102

APPENDIX B-1

RE: Case No. D-2116

Style: LESLIE GUINN v. TEXAS CHRISTIAN UNIVERSITY and THE HARRIS COLLEGE of NURSING, WILLIAM E. TUCKER, WILLIAM H. KOEHLER, PATRICIA SCEARSE, CAROLYN SPENCE CAGLE and CAROL A. STEPHENSON

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS, Clerk

by: s/ Courtland Crocker

Courtland Crocker, Deputy

Court of Appeals

Second Court of Appeals District

Fort Worth, Texas 76196

H. TOD WEAVER, Chief Justice

Justices:

JOE SPURLOCK II

JOHN HILL

DAVID FARRIS

HAL M. LATTIMORE

LAWRENCE E. MEYERS

SAM DAY

YVONNE PALMER, Clerk

The Courthouse

100 W. Weatherford Street

(817)884-1900

November 13, 1991

Leslie Guinn

APPENDIX C-1

4445 Rolling Hills Dr.

Fort Worth, Tx 76119

William L. Latham

McDONALD SANDERS

1300 Continental Plaza

Fort Worth, TX 76102

RE: Case No. 02-90-00209-CV

Trial Court No. - 117450-88

Style: Guinn, Leslie v.

Texas Christian Univ., Harris

Colleqe of Nursing et al.

Dear Counsel:

The Judgment of the Trial Court in the above styled case has this day been affirmed. Copies of the opinion and judgment of the Court are hereto attached.

Yours truly,

YVONNE PALMER, CLERK

s/ Mary Johns

By: Mary Johns, Deputy

NO. 2-90-209-CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

LESLIE GUINN APPELLANT

vs.

TEXAS CHRISTIAN UNIVERSITY, THE HARRIS COLLEGE OF NURSING, WILLIAM E. TUCKER, WILLIAM H. KOEHLER, PATRICIA SCEARSE, CAROLYN SPENCE CAGLE, and CAROL A. STEPHENSON APPELLEES

FROM THE 352ND DISTRICT COURT

OF TARRANT COUNTY

OPINION

Appellant, Leslie Guinn, filed this negligence suit against appellees, Texas Christian University ("TCU"), The Harris

College of Nursing ("HCN"), and five individuals, William E. Tucker, William H. Koehler, Patricia Scearse, Carolyn Spence Cagle, and Carol A. Stephenson, who appellant alleged were employees of TCU. Appellant sought to recover damages resulting from his alleged abuse and mistreatment by the TCU faculty and staff while he was a nursing student at HCN. Appellant here appeals from a summary judgment in favor of appellees, which ordered that appellant take nothing by his suit. Appellant acted pro se both at trial and on this appeal. We affirm.

Appellant, by three points of error, claims that the trial court erred: 1) in granting appellees' motion for summary judgment; 2) in exercising its discretion in consolidating appellant's county court counterclaim with his suit filed at the district court level; and 3) by failing to have a consolidation hearing.

Some basic background is needed for

clarity. Appellant initially enrolled as a student at TCU in the 1983 spring and summer semesters. Following completion of his course studies for those semesters, appellant's cumulative grade point average ("GPA") was 0.5. After dropping out of TCU, he attended The University of Texas at Arlington's Nursing School. There, as a result of receiving grades of "D" in a nursing course that he took twice, he was declared ineligible to continue in their nursing program. In the spring of 1985, appellant inquired about readmission to TCU and sought enrollment in HCN. It was not until January of 1986 that appellant actually sought counseling concerning class schedules and course requirements, and he was enrolled as a nursing major for that semester.

Upon completion of the spring 1986 semester, appellant's GPA was 2.545; however, his cumulative GPA was 1.823. Although appellant was ineligible to enroll

in upper division nursing courses until his GPA exceeded 2.0, HCN administrators were unaware of appellant's 1983 TCU course work, and he was mistakenly allowed to enroll in upper division nursing courses for the fall 1986 semester. Pursuant to HCN policies and course requirements, appellant enrolled in the required clinical rotation component of Medical/Surgical II ("N4423"), in which he was advised by his instructor in November 1986 that his progress was unsatisfactory. HCN's dean also notified appellant of his unsatisfactory progress and asked him to take corrective measures. However, appellant received a failing grade in the N4423 class along with one other student.

At the conclusion of the 1986 fall semester, appellant's cumulative GPA was 1.8. Although HCN's policy distributed to all students provided that nursing students had to maintain at least a 2.0 GPA, HCN's dean approved appellant's conditional

registration in nursing courses for the 1987 spring semester, pending the outcome of an appeal of the failing grade. Appellant also had other options such as retaking the N4423 class or non-nursing courses in order to raise his GPA to a 2.0. Appellant never enrolled for the nursing courses in the spring of 1987, but instead, elected to appeal the grade.

Appellant was informed both orally and in writing, that to initiate the appeal process, he must first attempt to resolve the N4423 "F " grade with the instructor, and obtain his evaluation form from her. Appellant refused to secure this meeting. In May of 1987, HCN's dean reviewed his N4423 "F" grade and found it to be appropriate.

On September 1, 1987, appellant requested an appeal hearing, and, after an exchange of letters, a hearing date was set for November 24, 1987. Appellant did not appear and did not send any written

documents for the appeals committee to consider; thus, this committee decided the grade of "F" should stand. Twice in 1988, TCU/HCN was informed by the United States Department of Education, Office for Civil Rights, that appellant had filed a complaint alleging race and sex discrimination in its grading, student enrollment, and class scheduling policies and procedures by: 1) failing to issue him a passing grade in the N4423 class; 2) refusing to allow him to enroll for the 1987 spring semester; and 3) requiring him to enroll in two courses that met at the same time. After on-site investigations, the Office for Civil Rights found TCU/HCN in compliance with all federal laws.

On November 11, 1988, TCU sued appellant in county court to recover sums owed by appellant for credit extended to him. On December 12, 1988, appellant filed his answer and counterclaim, and, although vaguely drafted, it alleged various acts of

negligence by TCU and HCN unrelated to TCU's suit. On that same date, appellant filed the present suit in district court alleging the same claims asserted in his county court counterclaim. on May 24, 1989, the county court suit was transferred and consolidated for judicial economy into appellant's pending district court suit, since the transferred cause of action was substantially the same. On December 5, 1989, appellant filed an amended petition reasserting the same negligence claims he had previously asserted and added the individual appellees as defendants. On May 23, 1990, the district court granted appellees' motion for summary judgment. This appeal followed.

We now consider whether the trial court erred in granting appellees' motion for summary judgment, as alleged in appellant's first point of error. Appellant's brief, although vaguely drafted, argues only that all appellees'

proof was controverted and that there were numerous issues of material fact raised. Appellant cites us to no cases in regard to whether he would have a justiciable cause of action against an educational institution even if his allegations were taken as true. Appellees argue that the summary judgment evidence before the trial court, even taken in a light most favorable to the appellant, supports the granting of the summary judgment because none of the alleged negligent acts or omissions by appellees creates a recognized cause of action against an educational institution.

In a summary judgment case, the issue on appeal is whether the movant met his burden for summary judgment by establishing that there exists no genuine issue of material fact and that he is entitled to judgment as a matter of law. City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 678 (Tex. 1979); Tex. R. Civ. P. 166a. The burden of proof is on the

movant, and all doubts as to the existence of a genuine issue as to a material fact are resolved against him. Great American R. Ins. Co. v. San Antonio Pl. Sup. Co., 391 S.W.2d 41, 47 (Tex. 1965). Therefore, we must view the evidence in the light most favorable to the nonmovant. See id. in deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence will be disregarded and the evidence favorable to the nonmovant will be accepted as true. Montgomery V. Kennedy, 669 S.W.2d 309, 311 (Tex. 1984); Farley v. Prudential Insurance Company, 480 S.W.2d 176, 178 (Tex. 1972). Every reasonable inference from the evidence must be indulged in favor of the nonmovant and any doubts resolved in his favor. Montgomery, 669 S.W.2d at 311. Evidence which favors the movant's position will not be considered unless it is uncontroverted. Great American, 391 S.W.2d at 47.

We may consider only the material on file with the trial court as of the time the summary judgment was granted. Dorbandt v. Bailey, 453 S.W.2d 205, 208 (Tex.Civ.App.--Tyler 1970, writ ref d n.r.e.). Appellees' proper summary judgment evidence consisted of its motion for summary judgment; affidavits of appellee, Stephenson, the instructor in appellant's N4423 class; various exhibits displaying appellant's deficiency as a nurse candidate, grades, and progress reports; various documents showing correspondence between HCN and appellant concerning appellant's dissatisfaction from his failing grade in the N4423 class and the grade appeal process; appellant's deposition taken by appellees; and a copy of TCU's bulletin.

We see appellant's response to the summary judgment (consisting of 551 pages), although vaguely drafted, as sounding in the tort of negligence complaining

generally about the educational system at TCU/HCN a-nd its faculty. Appellant's labyrinth of summary judgment evidence can be summarized in three general categories of complaints: 1) appellees' alleged negligent acts or omissions in counseling, teaching, and evaluating appellant in regard to his nursing courses at TCU, specifically, his N4423 class; 2) appellees' alleged negligent acts or omissions in reviewing and failing to remedy appellant's failing grade, and his treatment received in his N4423 class; and 3) appellees' failure to assist appellant's timely completion of his nursing degree.

The trial court was apparently reluctant, as we are, to intrude into a university's educational process, and to meddle in its student evaluation procedures and decision-making. Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 92, 98 S.Ct. 948, 956, 55 L.Ed.2d 124, 136 (1978) ("Courts are particularly

ill-equipped to evaluate academic performance"). When courts are asked to review the substance of which is genuinely an academic decision, they should show great respect for a faculty's professional judgment and .,may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Regents of University of Michigan v. Ewing, 474 U.S. 214, 225, 106 S.Ct. 507, 513, 88 L.Ed.2d 523, 532 (1985); see also, Foley v. Benedict, 122 Tex. 193, 55 S.W.2d 805 (1932). Many school decisions since Ewing have followed this mandate, and in reviewing the record for "professional judgment" evidence, once found, such evidence was considered sufficient to justify judgment against the student as a matter of law. Eiland v. Wolf, 764 S.W.2d 827, 835 (Tex.App.--Houston [1st Dist.] 1989, writ

denied); see, e.g., Clements v. Nassau County, 835 F.2d 1000, 1004-05 (2d Cir. 1987) (In cases involving academic dismissal, educational institutions have the right to receive summary judgment unless there is evidence from which a jury could conclude that there was no rational basis for the decision or that it was motivated by bad faith or ill will unrelated to academic performance.)

We acknowledge that appellant makes numerous conclusory allegations concerning abusive and misleading faculty conduct. However, keeping in mind that we must view the summary judgment evidence in a light most favorable to the nonmovant (appellant here), it is important to note that nowhere in the proper summary judgment evidence presented to the trial court is there any indication of appellee conduct relating to anything other than the educational system, the professional judgment of TCU's faculty, or the educating and reviewing processes of

the University. From a thorough review of the record on appeal, we see no arbitrary or capricious conduct or ill will by appellees in the summary judgment evidence that would have required the trial court to allow a jury to consider any cause of action against TCU. See Foley, 55 S.W.2d at 810. Nor is there any evidence that appellees' evaluation of the appellant's academic performance was based on nonacademic factors or the failure to exercise professional judgment; on the contrary, TCU apparently performed as their catalog so stated. We hold that the appellees established as a matter of law before the trial court that there were no genuine issues of material fact for a judge or a jury to resolve because there would have been no justiciable cause of action before them. TEX. R. Civ. P. 166a; Texas Department of Corrections v. Herring, 513 S.W.2d 6, 9 (Tex. 1974) (it is proper to grant the defendant's motion for summary

judgment when the plaintiff pleads facts which affirmatively negate his cause of action). Appellant's first point of error is overruled.

In appellant's second and third points of error, he argues that it was error for the district court to consolidate the county court suit into his district court suit filed the same day, and that it was error to have no consolidation hearing. We disagree. TEx. GOV'T CODE ANN. 74.121 (Vernon Supp. 1991), allows constitutional or statutory county courts to transfer cases to another court, even a district court, as long as they have consent and proper jurisdiction of the transferee court. Additionally, a district or statutory county court judge may hear and determine a matter pending in any district or statutory county court in that county regardless of whether the matter is preliminary or final or whether there is a judgment in the matter. TEx. GOV'T CODE

ANN. 74.094(a) (Vernon Supp. 1991). The two courts in this matter specifically followed the Government Code as indicated in each of the orders with regard to the transfer.

TEx. R. Civ. P. 174 clearly allows actions involving pending common questions of law or fact before a court to be consolidated to avoid unnecessary costs or delay. Additionally, suits filed separately may be consolidated on the court's own initiative at any stage of the action before jury submission, on such terms as are just. Tex. R. Civ. P. 4 1. Appellant relies solely on Tex. R. Civ. P. 165a(3) as authority that the trial court erred when it failed to give him a consolidation hearing. That rule concerns a hearing with regard to reinstatement after dismissal for want of prosecution, not consolidation.

From a review of the record, and as evidenced by the two court orders here in

question, there was no consolidation error in this case on appeal. Appellant's second and third points of error are overruled.

The judgment of the trial court is affirmed.

/s/H. TOD WEAVER

H. TOD WEAVER

CHIEF JUSTICE

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

Leslie Guinn	)	
	)	
VS.	)	No. 2-90-209-CV
	)	
Texas Christian	)	
	)	
University, Harris	)	
	)	
College of Nursing,	)	
	)	
et el.	)	

ORDER

On this day came on to be considered the motion of appellant, Leslie Guinn, for rehearing.

It is the opinion of this Court that the motion for rehearing should be and is hereby overruled. It is the order of this Court that the opinion and judgment of November 1 3, 1 991 stand unchanged.

The Clerk of this Court is directed to transmit a copy of this Order to the attorneys of record.

It is so ordered.

SIGNED THIS 31st day of December, 1991.

/s/H.TOD WEAVER

H. TOD WEAVER

CHIEF JUSTICE

No. 352-117450-88

LESLIE GUINN	)	IN
	)	
	)	THE
	)	
	)	DISTRICT
	)	
	)	COURT
	)	
	)	
V.	)	
	)	
	)	
TEXAS CHRISTIAN UNIVERSITY,	)	TARRANT
	)	
THE HARRIS COLLEGE OF NURSING,	)	COUNTY
	)	
WILLIAM E. TUCKER,	)	TEXAS
	)	
WILLIAM H. KOEHLER,	)	
	)	
PATRICIA D. SCEARSE,	)	352ND
	)	
CAROLYN SPENCE CAGLE	)	JUDICIAL
	)	
and CAROL A. STEPHENSON	)	DISTRICT

SUMMARY JUDGMENT

On the 18th day of May, 1990, came on for hearing the Defendants' Motion for Summary Judgment in the above-entitled and numbered cause wherein LESLIE I. GUINN is Plaintiff and TEXAS CHRISTIAN UNIVERSITY, THE HARRIS COLLEGE OF NURSING, WILLIAM E. TUCKER, WILLIAM H. KOEHLER,

PATRICIA D. SCEARSE, CAROLYN SPENCE CAGLE and CAROL A. STEPHENSON are Defendants and further, TEXAS CHRISTIAN UNIVERSITY is Counterclaim-Plaintiff. The Court finds that the Motion was in the proper form and had been filed within the time limits established by the Rules of Civil Procedure. The Court further finds that Plaintiff was served with a copy of the Motion for Summary Judgment, along with the attached affidavit of Carol A. Stephenson and other summary judgment evidence attached to the Motion. Filed simultaneous with the Motion was the Defendants' Brief in Support of Defendants' Motion for Summary Judgment which the Court finds was also timely served on Plaintiff.

The Plaintiff appeared at the hearing on Defendants' Motion for Summary judgment in person and represented himself. The Defendants appeared by and through their attorney of record to prosecute thier Motion. Prior to taking

up the motion, the Court determined that Plaintiff had filed a Response to the Motion for Summary Judgment and Defendants had filed a Reply to Plaintiff's Response to Motion for Summary Judgment, all of which were properly before the Court for consideration.

After determining that the Motion for Summary Judgment was properly before the Court, the Court was advised that Plaintiff had filed objections to his entire deposition testimoney.

After reviewing the Court's file, the Court proceeded to consider the matters required by the Rules of Civil Procedure to be considered upon such motions, including the pleadings, the affidavits summited by Defendants and Plaintiff, the Brief submitted by Defendants, the summary judgemnt evidence attached to Defendat's Motion for Summary Judgment, and the statements and arguments of Plaintiff and Defendant's councle in response to

interrogation by the Court. After reviewing and considering all such matters, the Court is of the opinion that Defendat's Motion for Summary Judgment should be granted in all respects and that Plaintiff take nothing by his suit. The Court is of the further opinion that Plaintiff's objections to his deposition are without merit and should be denied in all respects.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Defendants Motion for Summary Judgment is hereby granted and that Plaintiff take nothing by his suit on any of his claims and causes of actions against Defendants.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff's objections to his deposition are hereby denied in all respects.

IT IT FURTHER ORDERED, ADJUDJED and DCREED that all cost are herby adjudged and taxed against Plaintiff for which let execution issue.

The Court futher finds that on this date, TEXAS CHRISTIAN UNIVERSITY, as Counterclaim-Plaintiff has filed its Notice of Dismissal and has dismissed all of its claims for affirmative relife against Plaintiff. The Court finds that this Summary Judgment disposes of all of the claims, issues and Parties befor the Court and therefore this judgment is a final judgment for purposes of appeal. All relief not expressly granted herin is herby denied.

IT IS SO ORDERD

SINGED this 23 day of May, 1990

/s/Bruse Auld

JUDGE PRESIDING

No. 352-117450-88

LESLIE GUINN	s	IN
	s	
	s	THE
	s	
	s	DISTRICT
	s	
	s	COURT
	s	
	s	
V.	s	
	s	
TEXAS CHRISTIAN UNIVERSITY,	s	TARRANT
	s	
THE HARRIS COLLEGE OF NURSING,	s	COUNTY
	s	
WILLIAM E. TUCKER, WILLIAM	s	TEXAS
	s	
H. KOEHLER, PATRICIA D.	s	352ND
	s	
SCEARSE, CAROLYN SPENCE CAGLE	s	JUDICIAL
	s	
and CAROL A. STEPHENSON	s	DISTRICT

NOTICE OF DISMISSAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES TEXAS CHRISTIAN UNIVERSITY, a Defendant and the Counterclaim-Plaintiff in the above entitled and numbered cause, and hereby notifies this Court that it is dismissing all of its affirmative claims against Plaintiff, LESLIE GUINN, currently pending in this lawsuit without prejudice to its

right to refile same. This dismissal without prejudice is, in part, due to the fact that all of Plaintiff's claims for affirmative relief against the Defendants have been dismissed pursuant to the Court's granting of Defendants' summary judgment motion. All costs of Court incurred by any party in this lawsuit shall be taxed and paid in accordance with and subject to the summary judgment signed in this cause.

Respectfully submitted,

McDONALD, SANDERS, GINSBURG,

NEWKIRK, GIBSON & WEBB

BY: s/George Haratsis

George Haratsis

State Bar No. 08941000

1300 Continental Plaza

Fort Worth, Texas 76102

(817)336-6651; Metro: 429-1150

(2)

Supreme Court, U.S.
FILED
DEC 18 1992
OFFICE OF THE CLERK

No. 92-890

In The

Supreme Court of the United States

October Term, 1992

LESLIE GUINN,

Petitioner,

v.

TEXAS CHRISTIAN UNIVERSITY, THE HARRIS COLLEGE OF NURSING, WILLIAM E. TUCKER, WILLIAM H. KOEHLER, PATRICIA SCEARSE, CAROLYN SPENCE CAGLE, and CAROL A. STEPHENSON,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State of Texas

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM L. LATHAM
Counsel of Record
GEORGE HARATSIS
McDONALD SANDERS,
A Professional Corporation
777 Main Street
1300 Continental Plaza
Fort Worth, Texas 76102
(817) 336-8651
(817) 334-0271 (fax)

Counsel for Respondents

BEST AVAILABLE COPY

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Petitioner claims the following issue should be considered by the Supreme Court.

> Weather [sic] a [sic] Individual posses [sic] a justiciable cause of action to sue or Counter-sue a University, it's [sic] faculty and staff for negligence resulting in the systematic discrimination, harassment, abuse and mistreatment of some students due to Respondents' gross departure from established professional practices, sexual bias, and the failure to use even ordinary care and caution with students under their care resulting in injury, and damage to those students.

It is the Respondents' position that this question of negligence is not one that merits review by the Supreme Court of the United States.

LIST OF PARTIES

1. The Petitioner herein, Leslie Guinn.
2. The Respondent herein, Texas Christian University.
3. The Respondent herein, The Harris College of Nursing.
4. The Respondent herein, William E. Tucker.
5. The Respondent herein, William H. Koehler.
6. The Respondent herein, Patricia Scearse.
7. The Respondent herein, Carolyn Spence Cagle.
8. The Respondent herein, Carol A. Stephenson.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE WRIT 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) 9, 10

Connelly v. University of Vermont and State Agricultural College, 244 F. Supp. 156 (D. Vt. 1965) 9

Donohue v. Copiague Union Free School District, 47 N.Y.2d 440, 414 N.Y.S.2d 375, 391 N.E.2d 1352 (1979) 10

Franklin v. Gwinnett County Public Schools, ___ U.S. ___, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992) 3

Guinn v. Texas Christian University, Harris College of Nursing, William E. Tucker, William H. Koehler Patricia Scearse, Carolyn Spence Cagle and Carol A. Stephenson, 818 S.W.2d 931 (Tex. App. – Fort Worth, *writ denied*) 1

Hoffman v. Board of Education, 49 N.Y.2d 121, 424 N.Y.S.2d 376, 400 N.E.2d 317 (1979) 10

Regents of the University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507, 88 L. Ed. 2d 523 (1985) ..9, 10

Smith v. Alameda County Social Services Agency, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1st Dist. 1979) 10

Tubell v. Dade County Public Schools, 419 So.2d 388 (Fla. Dist. Ct. App. D3 1982) 10

CODES, RULES AND STATUTES

20 U.S.C. § 1681 ..... 3, 6, 7

28 U.S.C. § 1257 3

TABLE OF AUTHORITIES – Continued

Page

Supreme Court Rule 13.2 2

Supreme Court Rule 13.3 2

Supreme Court Rule 13.6 2

Supreme Court Rule 30.3 2

Supreme Court Rule 33.7 2

SECONDARY SOURCES

Annot., 1 A.L.R. 4th 1139 (1980) 8

Annot., 33 A.L.R. 4th 1166 (1984) 8, 10

No. 92-890

In The

Supreme Court of the United States

October Term, 1992

LESLIE GUINN,

Petitioner,

v.

TEXAS CHRISTIAN UNIVERSITY, THE HARRIS-COLLEGE OF NURSING, WILLIAM E. TUCKER, WILLIAM H. KOEHLER, PATRICIA SCEARSE, CAROLYN SPENCE CAGLE, and CAROL A. STEPHENSON,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State of Texas

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion and order of the Court of Appeals, Second Appellate District of Texas in Fort Worth, Texas dated November 13, 1991 are produced at Appendices C and D in Petitioner's Petition for Writ of Certiorari. The opinion can also be found at 818 S.W.2d 931 (Tex. App. – Fort Worth, *writ denied*). The denial of Petitioner's Application for Writ of Error on May 20, 1992 and the overruling of Petitioner's Motion for Rehearing on June 17, 1992

by the Supreme Court of Texas are reproduced at Appendices A and B in Petitioner's Petition for Writ of Certiorari.

JURISDICTION

Petitioner's filing of his petition on November 23, 1992 is jurisdictionally out of time, and the Clerk should have refused to receive it. Supreme Court Rule 13.3. The Supreme Court of the State of Texas overruled Petitioner's last motion for rehearing on June 17, 1992. Petitioner's Petition for Writ of Certiorari was not even mailed for filing in "proper" form until November 20, 1992. Although Petitioner attempted to file a petition on September 17, 1992, that petition failed to comply with numerous provisions of the Court's rules. Although Supreme Court Rule 33.7 does allow for the untimely filing of non-complying documents, it requires that "new and proper copies are *promptly substituted.*" Emphasis added.

Petitioner's substitution of "proper" copies was certainly not prompt in that it was in excess of sixty (60) days after the petition was actually due and originally submitted for filing. Supreme Court Rule 13.2 only allows "for good cause shown" an extension of time to file a petition "not exceeding 60 days." In this matter, Petitioner neither sought an extension of time pursuant to Supreme Court Rules 13.6 and 30.3, nor showed any basis for not promptly substituting new and proper copies. Since the Petitioner has not adhered to either Rule 13 or Rule 33, this Court should either refuse to accept for

filing Petitioner's jurisdictionally out of time Petition for Writ of Certiorari or dismiss Petitioner's action.

Furthermore, Petitioner's action does not bring into question any statute, state or federal, which is repugnant to the Constitution or laws of the United States. Nor does Petitioner's pleadings below bring into question any violation by Respondents of the Constitution or any federal statute, treaty or law. Such issues are necessary for this Court to maintain jurisdiction over this attempted review of a state court's actions pursuant to 28 U.S.C. § 1257. As stated in the state court's opinion, Petitioner's pleadings raise only tort issues (Petitioner's Appendix D). Nowhere can Petitioner cite to any allegation of sex discrimination in his pleadings before the state court. In fact, not even in Petitioner's own Statement of Case, does he demonstrate or even state any wrongful acts of Respondents due to sex discrimination under Title IX, 20 U.S.C. § 1681.

Finally, even a cursory review of the issues and questions urged in the Petition for Certiorari by Petitioner show no basis for this Court to exercise its discretion to review this matter. There exists no special or important reasons to grant this petition. All the courts below have followed this Court's prior opinions where applicable, and the case of *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), solely relied upon by Petitioner as a basis for this Court's review, is totally inapplicable in both fact and legal precedent to this case.

STATEMENT OF CASE

This is an appeal from the trial courts granting of a summary judgment against Petitioner. Petitioner, a former student at Texas Christian University ("TCU"), sued for money damages alleging certain negligent acts and omissions by Respondents (TCU, the Harris College of Nursing, and some of its professors, administrators and even the Chancellor) in failing to give him a passing grade and in their supervision of his academic activities. The opinion of the state court of appeals (Petitioner's Appendix D-2 through 7) correctly states the nature and results of Petitioner's suit. The following particular facts may be useful in the Court's consideration on whether to deny this petition.

Petitioner initially enrolled as a student at TCU in the spring and summer semesters of 1983 (Petitioner's Appendix D-3). Petitioner dropped out of TCU after those two terms with a 0.5 grade point average and enrolled in the nursing school at the University of Texas at Arlington (*Id.*). After being declared ineligible at that school, he again inquired about readmission to TCU in the spring of 1985 (*Id.*). In January 1986, Petitioner again enrolled for the spring semester without disclosing his problems at University of Texas at Arlington or his prior course of study at TCU.

Petitioner's semester grade point average for the spring of 1986 was 2.545; however, his cumulative grade point average was only 1.823. Although ineligible to enroll in upper division nursing courses because his grade point average did not exceed the required 2.0 minimum, Respondents mistakenly allowed Petitioner to

enroll in upper division nursing courses for the fall 1986 semester, unaware of his 1983 TCU courses (*Id.* at 3-4). Petitioner's progress in these upper level courses was again unsatisfactory, and he was so notified and asked to take corrective measures (*Id.* at 4). Petitioner ultimately received a failing grade in the course despite these warnings (*Id.*).

At the conclusion of the fall semester of 1986, Petitioner's cumulative grade point average at TCU decreased below the minimum required to continue in the nursing program (*Id.*). As a special accommodation, however, Petitioner was approved for conditional registration in nursing courses for the spring 1987 semester pending the outcome of an appeal of his failing grade (*Id.*). Although Petitioner had indicated his desire to continue his progression through the nursing program pending the outcome of the appeal, he never again enrolled in courses at TCU (*Id.* at 5).

During these discussions, Petitioner was advised of the appeal process but failed to comply with the procedures throughout the process (*Id.* at 5). After being notified of the hearing on Petitioner's appeal of his failing grades, he neither appeared at the hearing nor presented any written documents for the committee's consideration (*Id.* at 5-6). Petitioner's failing grade was not changed.

On or about November 11, 1988, unrelated to any of the complaints or appeals urged by Petitioner, Texas Christian University sued to recover sums due and owing the school on an account for credit extended to Petitioner. Petitioner answered the lawsuit and filed a counterclaim

alleging various acts of negligence unrelated to the debt (*Id.* at 6-7). On that same day, Petitioner filed a separate lawsuit alleging the same negligence claims asserted in his counterclaim (*Id.*).

The suits were consolidated, and ultimately a summary judgment in favor of Respondents was entered that Petitioner take nothing by his suit as alleged in his pleadings. Petitioner raised three points of error in the state court of appeals, none of which dealt with or even asserted sex discrimination under 20 U.S.C. § 1681. The court of appeals, affirmed the trial court and issued an opinion on November 13, 1991 (Petitioner's Appendix D).

For the first time before the Supreme Court of Texas, Petitioner asserted that the acts of Respondents were discriminatory under Title IX, 20 U.S.C. § 1681. Petitioner's application for writ of error to the state supreme court merely injected the term "discrimination" along with its other tortious terms without presenting any new or different facts or showing that he was prevented from raising claims for sex discrimination below.

REASONS FOR DENYING THE WRIT

1. PETITIONER'S CLAIMS ARE OF NEGLIGENCE NOT DISCRIMINATION.

As pointed out in the opinion of the court of appeals (Petitioner's Appendix D), all of Petitioner's complaints, as set forth in his final pleadings before the trial court, sounded only in the tort of negligence. In his Petition for Writ of Certiorari and for the first time before the

Supreme Court of Texas, Petitioner wrongfully characterized this case as one based on sex discrimination, particularly Title IX, 20 U.S.C. § 1681. Any indication that Petitioner's lawsuit ever involved discrimination is misleading, if not a direct misstatement. Petitioner's suit is simply a tort action and does not present any basis for this Court's consideration, much less granting the Petition for Writ of Certiorari.

All of Petitioner's pleadings and affidavits sound in tort or negligence complaining generally about the educational system at TCU or of its faculty. These pleadings fail to even mention sex or race discrimination as a basis for damages. The facts even as pleaded and argued by Petitioner simply indicate a complaint about his negligent treatment as a student, not sex discrimination.

The Petitioner's pleadings included no allegations of discrimination of any form, even though prior to the filing of this suit, Petitioner had filed two complaints with the United States Department of Education, alleging the college had discriminated against him on the basis of his race and sex (Petitioner's Appendix D-6). After conducting thorough on-site investigations into Petitioner's complaints each time, the Department found no evidence to support the allegations and determined that TCU was in compliance with all applicable federal laws (*Id.*) No further action was taken by Petitioner on these complaints after his claims were found not to be supported. The lawsuit filed in response to TCU's attempts to collect its debt never referenced any prior complaints, much less described any discrimination based on sex or race.

As stated by the court of appeals, Petitioner's labyrinth of pleadings and summary judgment evidence can be summarized into three general categories of complaints: (1) Respondents' alleged negligent acts or omissions in counseling, teaching and evaluating Petitioner in regard to his nursing courses at TCU; (2) Respondents' alleged negligent acts or omissions in reviewing and failing to remedy Petitioner's failing grade, and his treatment received in his class; and (3) Respondents' failure to assist Petitioner in his timely completion of his nursing degree (Petitioner's Appendix D-11). Therefore, all of Petitioner's allegations require judicial review of the educational process and the exercise of professional judgment at TCU, instead of any complaint about discrimination. Thus no important question for this Court exists, much less a statutory basis for this Court to exercise its jurisdiction to review the issue of Respondents' negligence, if any.

2. NO JUSTICIABLE CAUSE OF ACTION.

The real question at issue in this case deals with the intrusion into the academic affairs of educators by the judiciary. This does not present a novel or important question for this Court's consideration. In fact, this Court has lead the way in refusing to intrude upon the educational process and professional judgment of educators in matters of academic performance, educational policy and decision-making and, therefore, have declined to hold a school liable for such educational malpractice. Annot., 33 A.L.R. 4th 1166, 1167 (1984); Annot., 1 A.L.R. 4th 1139, 1140 (1980). Neither a court nor a jury are in a position to

substitute its judgment for that of a professor or faculty committee which is:

> uniquely positioned to observe [the student's] judgment, self-discipline, and ability to handle stress and was thus specially well-suited to make the necessarily subjective judgment of [the student's] prospects for success. . . .

Regents of the University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985).

School authorities have the *absolute discretion* and courts should not meddle in a university's student evaluation procedures and decision-making. *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 92, 98 S.Ct. 948, 956, 55 L.Ed. 124, 136 (1978).

> In matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree on the school faculty's freedom from interference from other noneducational tribunals.

Connelly v. University of Vermont and State Agricultural College, 244 F. Supp. 156, 160 (D. Vt. 1965). The question of whether a student should or should not receive a passing grade is a matter left wholly within the discretion of the professor and the university "who alone are qualified to make such a determination." *Id.* at 161. "Courts are particularly ill-equipped to evaluate academic performance." *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 92, 98 S.Ct. 948, 55 L.Ed.2d 124, 136 (1978). Academic evaluations of a student do not lend themselves to judicial review, and the determination

of whether to dismiss a student from a program for academic reasons "requires an expert evaluation of cumulative information" that is, by its very nature, somewhat subjective. *Id.* 435 U.S. at 90, 55 L.Ed.2d at 135. This function is by tradition and reason left to school officials to whose judgment a reviewing court is to accord great deference. *Id.*

This policy of judicial restraint also applies in a university's placement, educational and policy decisions such as placement of a student in special programs. *See* Annot., 33 A.L.R. 4th 1166, 1168 (1984); *see also, Tubell v. Dade County Public Schools*, 419 So.2d 388 (Fla. App. D3 1982), *Hoffman v. Board of Education*, 49 N.Y.2d 121, 424 N.Y.S.2d 376, 400 N.E.2d 317 (1979). Public policy considerations concerning the propriety and efficacy of judicial review of the educational system precludes a finding of liability or *even the recognition of a cause of action*. Annot., 33 A.L.R. 4th 1166, 1168 (1984), *see also, Smith v. Alameda County Social Services Agency*, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1st Dist. 1979). *Donohue v. Copiague Union Free School District*, 47 N.Y.2d 440, 414 N.Y.S.2d 375, 391 N.E.2d 1352 (1979).

Under the precedent established by the U.S. Supreme Court in *Board of Curators of the University of Missouri v. Horowitz* and *Regents of the University of Michigan v. Ewing*, Respondents established as a matter of law before the trial court that professional judgment was being exercised and, therefore, no genuine issues of material fact existed for a trier of fact to resolve. The conduct of Respondents pleaded by Petitioner, including assigning him a grade of "F," was based on professional judgment related solely to Petitioner's academic performance and

nothing else. The Texas courts properly applied the precedent which holds that such claims simply do not state a cause of action established by the Supreme Court and recognized in Texas. There simply is no basis to urge before this Court that sex discrimination was ever a part of this lawsuit. All of the courts below considered these matters and acted in accord with this Court's opinions in granting judgment for the Respondents.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari filed by Petitioner LESLIE GUINN should be denied.

Respectfully submitted,

WILLIAM L. LATHAM
Counsel of Record
GEORGE HARATSIS
McDONALD SANDERS,
A Professional Corporation
777 Main Street
1300 Continental Plaza
Fort Worth, Texas 76102
(817) 336-8651
(817) 334-0271 (fax)

Counsel for Respondents Texas Christian University, The Harris College of Nursing, William E. Tucker, William H. Koehler, Patricia Scearse, Carolyn Spence Cagle, and Carol A. Stephenson